THE NEEDS OF THE SUPREME COURT.

DURING the last twelve months the country has passed through the struggle and intense excitement of a warmly contested Presidential election. The popular mind has been intent upon one idea, and absorbed in a single purpose. But the struggle has come to an end, a new administration has been installed in office, and it may now be expected that party excitement will die away, that calmer counsels will prevail, and that men will be better able to consider wisely the things that concern all parties alike. It is a good time, therefore, to call attention to subjects of pressing necessity,—subjects in which the Government and all our people have a common interest. Among these there is no one of greater importance, or which more urgently demands public attention and judicious action, than the present condition and necessities of the Supreme Court of the United States.

In 1801, when John Marshall was appointed Chief Justice of that court, the number of cases brought into it for adjudication was only ten. The entire number during the five next following years, including both writs of error and appeals, was only one hundred and twenty, or an average of twenty-four for each year. Thenceforward the business of the court increased slowly until, in the period between 1826 and 1830, the aggregate number of cases brought into it was two hundred and eighty-nine,—the average being about fifty-eight a year. In 1836, when Roger B. Taney succeeded Marshall as Chief Justice, the number was only thirty-seven. From 1830 to 1850, the increase was also very gradual. Within the five years ending with 1850, the number of cases brought into the court, including those docketed and dismissed without argument, was three hundred and fifty-seven, or an average of seventy-one each year. The court was

then able to dispose of its entire docket during a session of three months. But, since the year 1850, the increase has been much more rapid. Within the five years ending with 1880, the number of new cases has been nineteen hundred and fifty-five, averaging more than three hundred and ninety-one each year. This exhibits, certainly, a very remarkable increase, serious in its consequences.

The causes which have given rise to it are numerous. Apart from the growth of our population and wealth, and from the amazing extension of our inhabited territory within the last thirty years (which alone might have been expected to increase greatly the business of the court), the questions which grew out of the civil war, out of the thirteenth, fourteenth, and fifteenth amendments of the Constitution, and out of the reconstruction statutes, have in large numbers come up for adjudication. The annexation of Texas, the Mexican war, and the acquisition of Mexican territory, have also contributed greatly to swell the number. It is true that most of the controversies that had their origin in these causes have, probably, been determined; and it may, perhaps, be anticipated that similar controversies will not hereafter, in so great numbers, find their way into the Federal courts, though, doubtless, some will, during many years to come. But there are other causes for the increase in the business of the Supreme Court, which may be expected to continue operative hereafter. Among these is the discovery of mines, with the great and growing extent of mining interests. So, also, the enormous development of railroad interests within the last thirty years, the railroads overleaping State lines, and absorbing largely the transportation and property of the country. The constitution of the Court of Claims, in which suits may be brought directly against the Government,—suits removable by appeals into the Supreme Court,—is another fruitful cause. So, also, is the organization of so many territorial courts, the judgments of which are necessarily reviewable in the Supreme Court. All these are permanent sources of increase in the business of that court.

There are still other prolific causes constantly operating in the same direction. Since 1850, Congress, by numerous acts, has greatly enlarged the jurisdiction of the Federal circuit courts. Additional provisions have been made for the removal into them of cases pending in State courts, and, as a consequence, such

removals are much more numerous than they formerly were. Through the circuit courts the cases are brought into the Supreme Court for final adjudication.

Jurisdiction has also been given to the Federal circuit courts of suits brought by or against national banking associations, and of suits brought on account of alleged violations of inhibitions contained in the recent constitutional amendments. These causes, combined with others that might be mentioned, have immensely magnified the business of the Supreme Court, and they promise a steadily growing increase hereafter, in the number and variety of its cases.

It is not, however, so much with the causes that have operated to swell the calendar of the court to its present unwieldy dimensions that it is proposed to deal, as with the fact itself of the great growth of business therein, and the embarrassments now felt in consequence thereof. The business of the court has reached such dimensions that relief is indispensable. Notwithstanding the utmost efforts of the judges, though, in addition to their circuit-court duties, they sit in bank seven months of each year, instead of three as formerly, though for years past, as a rule, they work from an early hour in the morning to a late hour at night, not less than from eight to twelve hours a day, they have not been able to hear and decide the cases upon their argument list, nor even to prevent a steady accumulation of undecided cases from term to term. When the court rises (usually in May) and the judges leave for their circuits, there is always a greater number of *remanets* than there was at the close of the term in the next preceding year. The number of cases set down for argument at the October sessions of 1880 was eleven hundred and fifty-two. It will be larger at the October sessions of this year. The consequences of this are obvious. Cases cannot be heard within less than from two and a half to three years after they have been brought into the court. Suitors are thus unreasonably delayed, and there is some foundation for the complaint, now often heard, that justice is practically denied. The public questions, *i. e.*, those in which both the Government and private individuals are interested, those involving the validity or construction of Federal statutes, and those which relate to alleged conflicts between the Constitution and State laws, encounter delays, embarrassing and hurtful to the public interests. They necessarily remain long undecided.

These are great evils, but they are not attributable to any fault of this court. No one has ever complained that the judges are idlers, or that they have not, to the full extent of their power, performed their whole duty. It should be observed that, in estimating the burden imposed upon them, the number of cases that come under their consideration is not alone to be regarded. The nature of the cases is, at least, equally to be weighed. Into some of the State courts of last resort there are as many cases brought annually, by writs of error, or appeal, or motions for new trials, as find their way into the Supreme Court of the United States, but they are far less varied in character. The State courts have one system of law to administer—a system with which the judges of those courts may be presumed to have been familiar during all their professional lives. Not so with the Supreme Court of the United States. The cases in that court come from thirty-eight States, eight territories, and the District of Columbia, each having a system of its own. The laws of these States respectively are required to be rules of decision in the Federal courts, in trials at law. There are, therefore, forty-seven different systems of law which the Supreme Court is called upon to administer in part. Besides these, in many cases, French, Spanish, or Mexican law, or the law of the sea, are to be understood and applied. The interpretation and effect of treaties, and the law of nations, are also to be considered.

It is easy to see, therefore, that the relief which the court needs cannot come from itself. If found anywhere, it must come from the action of Congress. What that relief should be, or rather by what arrangement it can be obtained, is a subject which, during the last three or four years, has attracted public thought to some extent, though not as much as its pressing importance demands. It is evident that what is needed is more than a temporary expedient. If the organization and jurisdiction of the court are to remain the same as they now are, and if there be no change in the classes of cases which it may be required to hear and decide, its business may be expected to increase hereafter, rather than diminish. It must grow with the growth of the country in population, industry, and wealth. It must grow with the admission into the Union of every new State, and with the consequent establishment of additional circuit courts. There is no probability that the jurisdiction of the Federal courts will ever be less than it now is. Congress has

not yet conferred upon them all the jurisdiction that the Constitution warrants, and for years there has been a pressure for a wider jurisdiction than that which has hitherto been given—a pressure which in some quarters contends even for giving to the Supreme Court ultimate cognizance of large classes of criminal cases—a jurisdiction which, if conferred, would completely swamp it. What is needed, therefore, is some legislation that will diminish the number of cases that come into the court to such an extent that it may be able to hear and determine within a reasonable time everything brought before it for decision, while at the same time equal and exact justice shall be accorded to all litigants. It must be admitted that for devising such a scheme great wisdom and caution are needed, but such an arrangement, it is believed, is possible.

Several plans have been suggested. Among them is one that proposes only an increase in the number of the judges. The present number is nine, and the proposition is to enlarge it to twelve. But to those who are acquainted with the court and its duties, it is very obvious that such a change in its organization would not relieve it, or lessen the embarrassment under which it now labors. An addition to the number of judges would indeed diminish the number of opinions which each judge is required to write. To that extent it would afford personal relief, but that is comparatively a small matter. It is not in the preparation of opinions that the chief labor of the court consists. It is in the examination of the records, after the argument has closed, in the analysis of the cases, in the investigation of authorities, in the formation of judgments, and in the ascertainment of the reasons upon which the judgments should rest. Whatever may be the practice in some State courts, in the Supreme Court of the United States all this must be done by each judge in every case. When done, the judges come together in conference, compare their views, discuss differences, and endeavor to bring their minds into harmony with each other. This is done before any conclusion is reached, and before any judgment can be delivered, or any opinion can be prepared. If the judges are, as they should be, not merely men of learning, but independent thinkers, it must often be found that there are great differences of opinion among them. They may not understand the facts of a case alike. One may attach greater importance to some of the evidence than others are willing to accord to it. One may think

the case governed by a legal principle which others regard as inapplicable to it. And even when there is no doubt what judgment should be given, there is often great diversity of opinion respecting the reasons which should be assigned for it. Just here is where the severest labor of the judges is found. The diverse views of the judges, as has been said, are brought into conference, and made the subjects of discussion. Conflicting opinions are there to be harmonized, if possible, and a common conclusion is to be reached. This is often a difficult task. Discussions in conference are, in some cases, long protracted in the court as it now is. What if the court were enlarged? It is needless to say that it would require more time to bring twelve minds that are trained to think for themselves to a common conclusion than it now requires to harmonize the opinions of nine. A simple increase in the number of the judges, therefore, instead of facilitating the dispatch of business, would tend to retard it, without materially diminishing the labor of the several members of the court. That it would not add to the number of cases that are now heard and decided is sufficiently manifest. Twelve judges sitting in bank can hear no greater number of cases argued than can nine, and of course, they can decide no more. Upon the whole, then, the effect of such an addition would be to render the court more cumbrous, without increasing the value of its judgments, and without tending in the slightest degree to furnish relief from the pressure now upon it.

Another plan has been proposed. It is to add twelve justices to the number of which the court is now composed, making the entire number twenty-one, and dividing them into sections of seven each, thus practically constituting three courts. The plan proposes that there shall be assigned to each section, as near as may be, an equal share of the business of the entire court, in such a manner, however, that particular classes of cases shall be given to one section, and other classes to the other sections severally, saving only that records which require a construction of the Constitution or a statute of the United States, or of a treaty therewith, and causes removed by writ of error from the highest court of any State, shall be considered by the whole court in general session. Under this plan, each section or division is to sit by itself, and hear argument upon the cases assigned to it, pronouncing judgments thereon, though the judgments are to be reported to the

full bench and there made final. This is substantially the re-organization proposed in a bill introduced by Mr. Manning, of Mississippi, into the House of Representatives on the 26th of January, 1880, and referred to the judiciary committee, from which no report has yet been made. The bill provides that if all, or six-sevenths, of the justices assigned to the division before which a case, or cause, is argued concur in the judgment thereon, such judgment, when reported to the full bench, shall be final, and not reviewable; but that if less than six-sevenths of the members of the division concur in the judgment, the case may be reheard in another division. If the judgments of the two divisions do not agree, the case may be again heard and adjudicated in the third division, and, at the discretion of the court, the cause may be reheard by all the justices in general session.

The objections to such a scheme as this are too many and too obvious to admit of its finding many advocates. With the provisions for rehearing the cases in the several divisions of the court, and for the final entry of the judgments, it may be doubted whether it would accelerate the disposition of the business, or, in any considerable degree, relieve the court from the crushing pressure now upon it. And with or without those provisions, the objections to the scheme are of the gravest character. Dividing the court into sections, each having power to hear cases and enter judgments unreviewable by any other tribunal, is, in effect, making three courts of last resort—three Supreme Courts of the United States. If not an infraction of the Constitution, which vests the judicial power in *one* Supreme Court (contemplating but one), and in such inferior courts as the Congress may from time to time ordain and establish, it is marvelously like an evasion of it. But without enlarging upon this thought (which, nevertheless, is worthy of serious consideration), it is obvious that the judgments of a section of the court would not command the confidence of the public, or of suitors, equally with the judgments of the entire court. They would not be the result of a conference of all the judges, and defeated parties would be apt to think that if their cases had been heard in another section, or by all the judges in the full court, the result would have been different. In the nature of things, a party whose case has had the consultation and conclusions of all the members of a court, will be more ready to acquiesce in a judgment against him than

he would be if he has had the opinion of only a part. And this lessened confidence in the court's judgments would not be confined to those who may be suitors, or parties litigant. It would extend throughout the entire public. It need not be said that this would be a great calamity. The usefulness of the Supreme Court is directly proportioned to the confidence which is felt in its judgments. Hitherto they have commanded the respect of the whole country. This is due, in part, to the fact that they are the pronounced conclusions of one great court, having large jurisdiction, and giving undivided attention to the matters that come under its cognizance. Any scheme or device that tends to diminish respect for the court, or to lower the estimate of its judgments, would impair its usefulness, and detract from the power which the highest interests of the country require it should exert.

The confidence now reposed in the court would also be endangered by the probable want of harmony in the opinions and judgments of the different sections. It cannot be expected that no diversity of decision would occur, or that doctrines would not be announced in one section which would not be accepted in the others. All experience has shown that the decisions of two courts of last resort, each administering the same system of law, even though a single system, do not always harmonize with each other. This appeared in the English superior courts which had concurrent jurisdiction, before the recent supreme court judicature acts, though the evil was mitigated by the final review of the House of Lords. It was shown in New York when there were in existence in that State, at one time, a court of appeals and a commission of appeals. The danger would be greater in the Federal Supreme Court, where numerous systems of law come under consideration, and where the laws of so many States are to be administered. And though the danger might be lessened by the allotment of particular classes of cases to the several sections, it would not cease to exist. There are numerous legal rules and principles that are common to all classes of cases, and no distribution could be made which would not require in each section the selection, assertion, and application of those principles.

There is still another objection to this plan of re-organization. It is that it commits to a court consisting of twenty-one justices the decision of all cases involving the construction of the Federal

Constitution, treaties, and statutes, and of all cases brought by writ of error to the highest court of any State. This is the most important function of the court, which, under any arrangement that may be made, cannot be disregarded with safety. To perform it well requires the highest learning and ability, with the most careful and conscientious attention of every justice. For such a duty, a court so large is not the best fitted. Its deliberations would be too much like those of a town meeting. A sense of personal responsibility is sometimes lost when an individual is associated in action with many others. And the results of observation certainly are, that the ability and efficiency of a court are greatest when the number of its judges is not large.

Another and less objectionable plan has been proposed, which, it is believed, would effectually relieve the Supreme Court, and enable it to answer all the purposes of its creation, while, at the same time, it would afford a much-needed relief to the several circuit courts, and insure generally a speedy and correct administration of justice. It is the establishment of a court of appeals in each of the nine circuits into which the country is divided—a court intermediate between the Supreme Court and the circuit courts. The details of the plan, as they have been proposed, are various. They all contemplate, however, having the new courts constituted, either entirely of the Supreme Court justice assigned to the circuit and two or three circuit judges, with, perhaps, some district judges, or of circuit judges alone, or of circuit judges associated with some district judges. The plan further contemplates that appeals may be taken to this intermediate court from the circuit courts in all cases proper for appeals, and that writs of error may be sent from it to these courts in proper cases for such writs; but that no appeal shall lie from any circuit court to the Supreme Court, nor any writ of error be sent from the Supreme Court to any circuit court, except in cases hereafter to be noticed. Judgments or decrees in the Court of Appeals are to be reviewable in the Supreme Court only when the amount in controversy in the case exceeds the sum of ten thousand dollars, or when the case requires the construction of the Constitution, or a treaty, or a statute of the United States, or when the court shall certify that the adjudication involves a legal question of sufficient general or public importance to make it advisable that the final decision

should be made by the Supreme Court, or where a writ of error, or an appeal, may be specially allowed by a justice of that court. Patent and copyright cases, also, without regard to the sum in controversy, by the plan suggested, are to be reviewable, as now, in the Supreme Court, and cases from the territorial courts are to be reviewable as now. Writs of error also are to be sent, as now, directly from the Supreme Court to the highest courts of the States in cases where, by the Constitution and laws of the United States, the judgments of those courts are reviewable in the Federal Supreme Court.

The details of this scheme may not have been sufficiently digested, but its outlines are enough to enable those who are acquainted with the embarrassments of the Supreme Court, and with the inadequate provision now existing for the administration of justice in the circuits, to form some rational estimate of its value. It is quite certain that, if adopted, it would bring speedy and permanent relief to the Supreme Court, without detracting at all from its power to perform all the functions for which it was created. The court would continue to be, as now, the final interpreter of the Constitution, treaties, and statutes of the United States, and the protector of all rights held under them. But the judgments of the intermediate courts would be final in a vast number of cases which now find their way directly into the Supreme Court, greatly encumbering its docket, though they present no questions within exclusively Federal jurisdiction. At the same time no injustice would be done to suitors. By far the largest number of cases which are tried in the circuit courts come into those courts because the parties are citizens of different States, or one of them is an alien. They involve no questions which do not arise in similar cases brought in the State courts—no questions which are not to be determined by the law of the State in which each case is tried. The law is the same, whoever the parties may be, and whatever may be the tribunal in which the case is tried. There can be no sound reason why the parties should have greater rights in the Federal courts than they would have if their case had been tried in the State court. Ordinarily, a party in a State court, whose case has been adjudged against him, can have a review in but one court of errors. To him that is the end of the law. If a judgment or a decree has been pronounced against him in a court of primary jurisdiction, he may resort to a superior court for the

correction of errors. If there the judgment be adverse to him, he is without further recourse. No one thinks of complaining that he cannot have a second review in a second court of errors.

Why should parties to suits in the circuit courts of the United States, who are there only because they are citizens of different States, or because one of them is an alien, and whose interests are unaffected by any Federal law, be entitled to more than one review of the original trial? What injustice is there in according to them the same rights which those enjoy who are litigants in State courts? If they may have a right to a review, in a court of errors, of an adverse decision of the court of original jurisdiction, it is all that litigants in State courts have, and presumably the judges of the intermediate Court of Appeals would, in learning and ability, be at least equal to the judges of the State courts. But if such cases should, in general, reach a final decision in an intermediate court, the Supreme Court would be relieved permanently of at least one-half of its business, and would be able to hear and determine, within a reasonable time, all the cases that could come into it. There would no longer be any complaint of a denial of justice. Every question respecting the force and effect of Congressional statutes, or respecting private rights declared or protected by Federal power, would be met and answered in due time; the embarrassments now so often felt in governmental operations would be removed, and certainty would be given to the relations of the citizen to the Government. The new organization would leave to the Supreme Court the decision of all questions relating to the powers of the Federal Government, to the construction, validity, and effect of the treaties and statutes of the United States, and to the validity of State legislation, when in alleged conflict with the Constitution. Uniformity of decision in the several courts of appeal would also be secured by the provision that any case may be reviewed in the Supreme Court when certified to it by the court in which it had been decided, or when a writ of error or an appeal had been allowed by a justice of the Supreme Court. A door would also be left open for the consideration, in that court, of those questions of general interest that occasionally arise which it is desirable should be answered in the same way in all parts of the country.

Such an arrangement would require, it must be admitted, an increase in the Federal judicial force, and it would be attended

by some additional cost—not much more, however, than the salaries of the new judges needed. There should be an increased number of circuit judges in each of the circuits—a number sufficient, with the single judge now allowed by law, to constitute the Court of Appeals. There should be at least three circuit judges in each, enough—with one or more of the district judges, who might be called in—to constitute the court. In regard to this there is some difference of opinion; yet to me it appears to be the wisest arrangement to have the court entirely constituted of the justice of the Supreme Court assigned to the circuit and circuit judges, leaving to the district judges their peculiar and appropriate work. In many of the districts they have time for little more. What with the criminal business, the admiralty, and the revenue, and the fifteen other classes of cases of which they have jurisdiction, they are likely to find full employment. And should a bankrupt act be enacted (as is probable), it will add very largely to their present labors. The circuit-court judges should, therefore, be left mainly in charge of the circuit courts and of the courts of appeals. This would give them ample employment. By this arrangement the business of the circuits would be much more efficiently done than it can be at present. There is a great lack of judicial force in most of them. The justices of the Supreme Court can do circuit-court duty only to a very limited extent. Most that is done must be done by a single circuit judge, aided, in some degree, by the district judges. It is notorious that in many of the circuits there is more to be done than can be accomplished in any reasonable time by the present force. And the business must increase with the growth of the country. The patent business alone exhibits an enormous increase. With more than two hundred new patents issuing from the Patent Office every week, the supplies for increased patent litigation are constantly multiplying. Even now, in six or seven of the circuits, the business is almost unmanageable. More than one hundred and sixty circuit courts are required by law to be held in the nine circuits every year. Some of the circuits are much too large. The second, embracing New York, Vermont, and Connecticut, has an utterly inadequate judicial force. So has the fifth, which includes the States of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas, and in which more than twenty circuit courts are to be held every year. The same may be said of the

eighth circuit, embracing Nebraska, Minnesota, Kansas, Iowa, Missouri, Arkansas, and Colorado. The seventh circuit, consisting of the States of Illinois, Indiana, and Wisconsin, considering the amount of the business therein, is also too large. And the same may probably be said of the third and sixth circuits. Throughout the country the increase of the force of the Federal judiciary has not kept pace at all with the increased necessity for it, growing out of the advance in population, wealth, and consequent litigation. With the exception of the addition in 1869 of nine circuit judges, it is very little more than it was fifty years ago, when the population of the United States was less than one-quarter what it is now, when the habits of society were much more simple, and when railroads and manufactures were almost unknown. There can be no justification for longer continuance of such a state of things. That administration of justice for which the judicial department of the Government was created—the assertion and vindication of civil rights, and the depression and punishment of public wrongs—is too important to admit of neglect or needless embarrassment. The framers of the Constitution foresaw the probable necessity of new provisions from time to time for the efficient exercise of the judicial power of the Government. Section one of the third article ordains that the judicial power of the Government shall be vested in one Supreme Court, and in such inferior courts as Congress shall, "*from time to time*," ordain and establish. Here is a clear indication that, as growing necessities may demand, new courts may be and should be established.

It is not intended in this article to point out minutely all the details of the plan recommended. The arrangement of those details requires not only perfect knowledge of what is needed, but great wisdom in devising the measures best adapted to supply the need. What is claimed is that an intermediate court, between the Supreme Court and the Circuit Court, the judgments of which shall be final in those cases heretofore mentioned, is the only possible means yet discovered sufficient to enable the Supreme Court to discharge promptly the duties imposed upon it, and to relieve it from its present great and growing embarrassment. How the intermediate court should be constituted may be left to the wisdom of Congress. But if it is desired also to give increased efficiency to the administration of justice in the circuits, as it certainly should be, there must be an addi-

tional judicial force in each; and if such force were provided, it would still the complaint often heard that cases in which the amount in controversy is less than five thousand dollars, decided in the circuit courts, are not entitled to review in any court of errors. As things are now, such a limitation is indispensable; but with a court of appeals, composed wholly or mainly of a sufficient number of circuit judges, it would be possible, and probably it would be judicious, to accord to losing parties, even in such cases, a right to have the judgments reviewed in that court. In the hurry of trials in the circuit courts, where questions are suddenly sprung upon the presiding judge, and where there is little time for deliberation, it will be that erroneous rulings are sometimes made, and it is a hardship, though now a necessary one, that such errors cannot be corrected in a higher court, even when the sum in controversy is not large.

So, also, the institution of an intermediate court of appeals would make it possible to allow writs of error to the circuit and district courts in the more important criminal cases. At present, the judgments of a single judge in those courts, pronouncing sentence to death or long imprisonment, are final. For them there is no review in any court of errors. Thus life and liberty have less protection than mere rights of property. This ought not to continue longer.

In conclusion, it may be repeated that there is probably no public necessity more urgent than that which is revealed by the present condition of the Supreme Court, and by the growing delays and embarrassments in the circuits. The next session of Congress will be a long one. It will give time for digesting thoroughly some scheme adequate to meet that necessity, and bring the administration of justice into such a condition that it shall accomplish all that is needed, and win the continued confidence of the country.

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